IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 1842 OF 2007

Anil Dinmani Shankar Joshi & anr..... Petitioner

versus

Ramnik Khimji Mahecha ..... Respondent.

Mr. A.J.Joshi for the petitioner
Respondent in person - present.

CORAM; A.P. DESHPANDE, J.
DATED; 15TH JUNE, 2007

P.C.;

1. This court had issued notice before admission on 15-3-2007 and parties were put on notice that the writ petition will be finally heard and decided at the admission stage.

2. Leave to amend. Rule. Rule made returnable forthwith. By consent of parties petition is taken up for final hearing.

3. The petitioner is the original plaintiff who has instituted a Special Civil Suit No. 18 of 1995 in the Court of Civil Judge, Senior Division, Panvel. Suit is for declaration and perpetual injunction. The respondent is defendant in the suit and he has resisted the claim of the plaintiff. Initially the suit was filed against the Municipal Corporation and the present respondent. However the Plaintiff has withdrawn the suit against the Municipal Corporation and the present respondent is the sole defendant.

4. The petitioner/plaintiff filed in all 11 documents before the trial court. The trial court by its order dated 21-3-2006 allowed the production of the said 11 documents and also permitted exhibiting the same as the trial court was of the view that the said documents are all public documents or certified copies of judgments/orders.

5. Aggrieved by the order passed by the trial court permitting the petitioner/plaintiff to file said 11 documents, the present respondent filed writ petition No.4040/06 in this court, which has been disposed of by an order dated 11-10-2006. This court partly allowed the writ petition and set aside the impugned order passed by the trial court to the extent it permitted exhibiting the documents at Sr. Nos. 5,6 and 11. This court further clarified that it shall be open for the plaintiff to prove the documents at Exh. 5,6 and 11 in accordance with the law.

6. It is relevant to note that on 21-3-2006 after the trial court permitted filing and exhibiting of the said 11 documents, the petitioner/plaintiff filed a pursis before the trial court intimating that the petitioner/plaintiff does not want to lead any further oral evidence. However, as this court by its order dated 11-10-2006 held that exhibiting documents at sr. nos. 5,6 and 11 out of the said 11 documents was not

proper, it has set aside the order passed by the trial court dated 21-5-2006 to that extent. When the writ petition was pending in this court, the present respondent moved an application dated 8-3-2006 and sought certain directions and the trial court has passed an order on the said application on 18-11-2006 i.e. after the decision of the High Court in regard to the exhibiting of the documents. If freely translated the order dated 18-11-2006 passed by the trial court, it reads thus:

> "Read the application and the say thereon. The defendant is seeking permission for cross examination. The High Court has made it clear in its order that it shall be open for the plaintiff to prove the documents at Sr. Nos. 5,6 and 11 in accordance with the law. Hence the plaintiff will have to lead oral evidence to prove the documents. To enable both the parties to put forth their case, the defendant is being granted permission to cross examine as asked for. Hence the application is allowed."

Reading of the said order makes it amply clear that the trial court was of the view that if the plaintiff leads evidence to prove the documents at Sr. Nos. 5,6 and 11, then the defendant would naturally have a right to cross examine him. Assuming that the

plaintiff would lead evidence with a view to exhibit the documents at Sr. Nos.5, 6 and 11, the trial court passed an order permitting the defendant to cross examine the plaintiff. The case was then fixed on 18-12-2006 on which date the counsel for the plaintiff was absent. The plaintiff filed an application that his advocate met with an accident and suffered a fracture of his leg and hence is not present in the court. On that ground the adjournment was asked for. The trial court by the order passed on the same day has rejected the said application,.

7. After rejection of the application for adjournment filed by the plaintiff, the defendant moved another application before the trial court, contending therein that the court should permit the defendant to cross examine the plaintiff as allowed by its order dated 16-11-2006 (should be 18-11-2006). The defendant also stated in the application that he is ready to proceed with the cross examination but once that is done, no further opportunity should be given to the plaintiff to lead any evidence. The trial court passed an order on the said application observing that the plaintiff is not willing to lead any evidence in the absence of his advocate and hence concluded that the plaintiff does not want to lead any evidence. It further observed that according to the order passed by the High Court, it was obligatory on the part of the

plaintiff to lead evidence to prove the documents at Sr. Nos. 5,6, and 11. It concluded by observing thus:

> The defendant should cross examine the plaintiff on the next date."

Thereafter the plaintiff filed an application on 12-2-2007 seeking review of the order dated 18-12-2006 which is below Exh.23. The review application was opposed by the defendant and the trial court proceeded to reject the review application by holding that the court had permitted the defendant the cross examination by the plaintiff by its order dated 18-12-2006. The court has ordered the plaintiff to remain present in the court and submit himself for the cross examination by the defendant. On the day when the plaintiff filed an application for review i.e. on 12-1-2007 he has again filed a pursis in the trial court that the plaintiff does not want to lead any evidence and has closed his evidence.

8. Aggrieved by the order passed by the trial court dated 18-11-2006 and the order passed in review dated 9-2-2007, this petition is filed. The learned counsel for the petitioner has pointed out that the plaintiff had already filed pursis in the trial court on 21-3-2006 stating therein that the plaintiff does not

want to lead any oral evidence and had closed his evidence. The said pursis was filed when the trial court had permitted exhibiting the 11 documents. The defendant had challenged the order passed by the trial court and this court by partly allowing the writ petition has found that exhibiting the documents at sr. nos. 5,6 and 11 was not proper and hence set aside the order passed by the trial court, to that extent. This court maintained the order passed by the trial court exhibiting all other documents. This court has not compelled the plaintiff to prove those documents. Despite the liberty being granted by this court, the plaintiff has chosen to take a decision not to lead any evidence and not to enter the witness box. Though the petitioner/plaintiff has filed categorical pursis first on 21-3-2006 and thereafter on 12-2-2007 that he does not propose to lead any evidence, still the trial court had passed an order closing the case of the plaintiff meaning thereby closing the examination-in-chief and directing the plaintiff to submit himself to the cross examination by the defendant. The learned counsel for the petitioner submits that it is the discretion and choice of the plaintiff as to whether should he lead any evidence or otherwise. In the submission of the learned counsel, the said right of the plaintiff cannot be negated by forcing him to submit to the cross examination. The plaintiff has not led any evidence by

examination-in-chief and has declined to lead any evidence. It is then contended that the court cannot close the case of the plaintiff to the extent of examination-in-chief and then force the plaintiff to submit the cross examination. On this premise, the contention of the learned counsel for the petitioner is that the impugned orders are wholly without jurisdiction, besides being illegal, unsustainable and improper.

9. The respondent is appearing in person. The respondent has submitted that the order dated 18-11-2006 which permits the defendant to cross examine the plaintiff has not being challenged in the present petition, and hence the said order which permits cross examination cannot be interfered with. What is relevant to note is that the order dated 18-11-2006 only permits the defendant to cross examine the plaintiff if the plaintiff proceeds to lead evidence with a view to exhibit the documents at Sr. Nos. 5,6 and 11, pursuant to the order passed by the High Court. The order dated 18-11-2006 cannot be construed as a direction to compel the plaintiff to submit himself to cross examine, even though he has filed pursis that he is closing his evidence and does not want to step into the witness box. For the first time, the trial court has passed an order, directing the plaintiff to remain present for cross examination

on 18-12-2006, that too after rejecting the application moved by the plaintiff seeking adjournment on account of absence of counsel and after directing closure of the examination-in-chief of the plaintiff. This order dated 18-12-2006 has been challenged in the present petition and it is this order which for the first time compels the plaintiff to submit himself to the cross examination.

10. As stated hereinabove, once the plaintiff choose not to lead any evidence and files a pursis on record, then it is not permissible for the court to compel him to submit to the cross examination of the defendant. The order passed by the trial court directing closure of examination-in-chief, in the facts of the present case, was also only unwarranted. I am of the clear view that as the petitioner/plaintiff is not desirous of leading any evidence, and has already filed two pursis on record one on 21-3-2006 and another on 12-1-2007, intimating the court about closure of the evidence of the plaintiff, then the trial court could not force the plaintiff to submit to the cross examination of the defendant. The impugned orders dated 18-12-2006 and 9-2-2007 being patently illegal and contrary to the established procedure, which are likely to result in miscarriage of justice, I am constrained to interfere with the same. The defendant has submitted that the plaintiff has filed some

affidavit in the trial court and made certain assertions in regard to the fact situation. In the submission of the defendant, the defendant in normal course would be entitled to cross examine the person swearing the affidavit. As the plaintiff has chosen not to step into the witness box, the defendant submits that he be permitted to move the trial court with a prayer to seek plaintiff's cross examination touching the affidavit or in the alternative to urge before the trial court not to consider the statements made in the affidavit by the plaintiff if he is not willing to step into the witness box. The defendant is permitted to make this prayer before the trial court.

11. In the result, the writ petition is allowed. The impugned orders dated 18-12-2006 and 9-2-2007 are quashed and set aside. It is made clear that the plaintiff shall not lead any evidence and it shall be open for the trial court to proceed with the recording of evidence of the defendant.

12. I hope and trust that the trial court will proceed to decide the suit as expeditiously as possible.

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